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No. 83-647

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LUI SU NAI-CHAO, Individually and as Personal Representative of the Estate of LUI CHO-PON DECEASED, ET AL.,
Petitioners,

v.

THE BOEING COMPANY, Et Al.,
Respondents,

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

RESPONDENT THE BOEING COMPANY'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the District Court properly exercised discretion in granting a forum non conveniens dismissal of the consolidated suits of several hundred foreign plaintiffs, only a small number of whom were resident aliens, after carefully weighing factors of public interest and private convenience.

II. Whether the United States, as a nation, has an interest in deterring American manufacturers from selling defective products, which constitutes a strong public interest factor favoring retention in some American jurisdiction of any action against an American manufacturer, even if the accident allegedly caused by the product occurred abroad and the plaintiffs are predominantly foreign.

III. Whether petitioners, who are predominantly foreign, are entitled to the same presumption favoring retention of jurisdiction by the federal courts that American plaintiffs would have received.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE NINTH CIRCUIT COURT OF APPEALS

Petitioners' list of parties includes the following six individuals who were not proper parties before the Ninth Circuit and are not proper parties to this petition: Yin Lin Chow, Richard Chow, Lauren Chow, Raymond Chow, Karen Chow, and Mary Chow. Petition at xiv. Petitioners also list seven individuals who they acknowledge were not parties to the proceedings below. Petition at xix-xx. Respondent objects to the inclusion of these seven in the list of parties and further objects to the characterization of them as interested parties.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, The Boeing Company, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Ninth Circuit Court of Appeals' decision in this case.

STATEMENT OF THE CASE

This litigation arises from the inflight breakup of a Boeing 737 aircraft operated by Far Eastern Air Transport Corporation ("FEAT"), a Taiwanese corporation. The aircraft, which FEAT had bought from United Airlines in 1976, was on a

domestic flight within Taiwan at the time of the accident. The Chinese Civil Aeronautics Authority, after investigating the accident, has concluded that the cause of the breakup was cracks in the aircraft's body, caused by rust and corrosion, which gave way under pressure. The aircraft had been maintained by FEAT personnel at FEAT's maintenance headquarters in Taiwan for over five years prior to the accident. *Cheng v. Boeing Co.*, 708 F.2d 1406, 1408 (9th Cir. 1983).

Petitioners and others sued respondents and others in the United States District Court for the Northern District of California. *Nai-Chao v. Boeing Co.*, 555 F. Supp. 9, 10 n.1 (N.D. Cal. 1982). The plaintiffs alleged that they were personal representatives of surviving relatives of persons killed in the accident. The district court found that out of a total of 564 plaintiffs, seven were United States citizens, four were aliens residing in this country, and the rest were nonresident aliens. *Id.* at 10.

On respondents' motion, the court ordered a dismissal of the suits that was contingent upon the fulfillment of certain conditions designed to facilitate plaintiffs' ability to sue in Taiwan. *Id.* at 22. One of these conditions—"[t]he courts of Taiwan have, and will assert, jurisdiction over these actions"—preserved the right of petitioners to resume their federal actions if the courts of Taiwan declined jurisdiction over their suits.

In reaching its decision, the district court first determined, based on affidavits submitted by both plaintiffs and defendants, that the Taiwanese courts were an alternative forum available to plaintiffs. The court then conducted a careful analysis of the "private interest" and "public interest" factors established by this Court for forum non conveniens motions in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

In weighing the private factors, the court catalogued the distribution of relevant evidence between Taiwan and the United States as follows: Evidence of FEAT's maintenance of the aircraft and of the investigation of the crash by the Chinese Civil Aeronautics Authority as well as the wreckage itself were all located in Taiwan. Additionally the damages evidence for almost all of the plaintiffs was in Taiwan and would require

translation before it could be heard in a United States court. *Nai-Chao*, 555 F. Supp. at 17-18. Evidence regarding the design, manufacture and certification of the aircraft and its maintenance by United Airlines were located in the United States. *Id.* at 17.

The court noted that it lacked process to compel the attendance of Taiwanese witnesses to the above matters and that discovery abroad in conjunction with a United States trial was likely to be fragmentary. *Id.* at 18.[1] The court also recognized that it was doubtful whether defendants could implead FEAT and the Chinese Civil Aeronautics Authority, whose absence would preclude a fair evaluation of third-party liability. *Id.* at 18-19.[2]

Proceeding to the public interest factors, the district court found them to be decisive. First, with its docket heavily congested, the court was reluctant to take a complex case that lacked significant connections to the forum. *Id.* at 19. Second, the court deferred to the principle that localized controversies should be tried where they arise. In this case, Taiwan had a strong local interest: the case involved an accident in Taiwanese airspace, a Taiwan-registered aircraft operated and maintained by a Taiwanese airline, and mostly Taiwanese decedents (87 of 110). The court also noted that the many contacts the litigation had with Taiwan outweighed the only possible American interest, the deterrence of Americans from manufacturing defective products—an interest that this Court had, in any case, discounted as a consideration in its forum non conveniens analysis in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). *Nai-Chao*, 555 F. Supp. at 19-20. Finally, the court concluded that under California choice of law principles Chinese law could govern the case, which would create a further burden for the court. *Id.* at 20-21.

The court held that these public interest factors, which it characterized as its "own administrative and legal problems" *id.* at 22, and the private interest factors compelled conditional dismissal of the suit, despite the presence of "a handful of

[1] By contrast, petitioners' access to Boeing and United employees as witnesses in a Taiwan trial is guaranteed by the terms of the district court's conditional dismissal.

[2] The court added that this ground was not necessary for granting the forum non conveniens motion. *Nai-Chao*, 555 F. Supp. at 19 n.14.

American plaintiffs." *Id.* at 21-22. The court concluded that plaintiffs' choice of an American forum was "outweighed by the private and public interest factors pointing towards dismissal of this action . . . ." *Id.* at 21.

On appeal, the Ninth Circuit upheld the district court's decision after noting that the court had analyzed the public and private factors and after addressing plaintiffs' general objections. *Cheng*, 708 F.2d at 1411.

REASONS FOR DENYING THE WRIT

I. The Decision Below Does Not Raise the First Question Presented in the Petition.

Petitioners' first question assumes the correctness of petitioners' assertion that the district court dismissed the action primarily or even solely because its docket was crowded. Petition at 5-6, 9. In fact, this assertion is wrong. The district court weighed several private and public interest factors in reaching its decision. *See Nai-Chao*, 555 F. Supp. 17-21. Its discussion of public factors alone fills two pages and consists of seven paragraphs. *Nai-Chao*, 555 F. Supp. at 19-21. Only once during this discussion, in a single sentence in the third paragraph, did the court mention its own docket:

> It is beyond dispute that the docket of this Court is heavily congested, and that the Court can ill afford the time and expense of adjudicating a controversy which does not have significant connections to this forum, particularly where, as here, the case will require a massive expenditure of judicial resources.

Id. at 19. Even here, the court weighed in conjunction with the docket factor a second public factor: the absence of any local interest in the case. This second factor and the possible application of Chinese law dominate the remainder of the discussion.

Because the district court did not dismiss petitioners' action solely because of its crowded docket, what petitioners style an "inter-circuit conflict as to *Piper's* effect on the legitimacy of

docket-protection as a controlling forum non conveniens factor" does not exist. Petition at 17. The asserted conflict with *Lake v. Richardson-Merrell, Inc.*, 538 F. Supp. 262 (N.D. Ohio 1982), in which a district court declined to dismiss a suit solely because of its crowded docket, is equally illusory. *Id.* at 275.

Petitioners also allege conflicts between the decisions below and a Fifth Circuit opinion, *Pusat v. M/V Tel Aviv*, 711 F.2d 1231 (5th Cir. 1983). Petition at 17. These supposed conflicts concern two issues: standard of appellate review and the appropriate weight to be given to a plaintiff's choice of forum. Neither of these issues is relevant to petitioners' first question presented. In any event, there is no such conflict between *Pusat* and *Cheng*. Both cases employed the same abuse of discretion standard for appellate review set forth by this Court in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).[3] Furthermore, both require the defendant to present factors that "strongly" favor trial in a forum different from that chosen by plaintiff.[4]

II. The Second Question Presented in the Petition Was Resolved by This Court in Piper.

Petitioners' second question raises an issue that was directly addressed in *Piper*. They ask this Court to review the question of whether there is a domestic interest in deterring United States manufacturers from distributing defective products that constitutes a strong "public interest" factor to be weighed by courts deciding forum non conveniens motions. In

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[3] *Compare Pusat v. M/V Tel Aviv*, 711 F.2d 1231, 1241 n.2 (5th Cir. 1983) (appellate court may reverse district court only if latter's action "constituted a clear abuse of discretion") *with Cheng v. Boeing Co.*, 708 F.2d 1406, 1409 (9th Cir. 1983) (decision of lower court "may be reversed only when there has been a clear abuse of discretion") *and with Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (trial court's decision "may be reversed only when there has been a clear abuse of discretion").

[4] *Compare Pusat*, 711 F.2d at 1240 (burden on defendant to present factors that "strongly favor trial in a specific alternative forum") *with Cheng*, 708 F.2d at 1410 ("plaintiff's choice of forum should not be disturbed 'unless the balance is strongly in favor of the defendant'") *and with Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981) ("[T]here is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum"). *See also Nai-Chao v. Boeing Co.*, 555 F. Supp. 9, 21 (N.D. Cal. 1982) ("strong presumption in favor of the plaintiff's choice of forum" may be overcome "only when the private and public interest factors clearly point towards trial in the alternative forum").

other words, petitioners suggest that deterrence should be added to the "public interest" factors first enumerated by this Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), this Court rejected the identical argument, using the following language:

> Respondent argues that American citizens have an interest in ensuring that American manufacturers are deterred from producing defective products and that additional deterrence might be obtained if Piper and Hartzell were tried in the United States, where they could be sued on the basis of both negligence and strict liability. However, the incremental deterrence that would be gained if this trial were held in an American court is likely to be insignificant.

The district court below quoted this language from *Piper* and found it fully applicable to the case before it. *Nai-Chao*, 555 F. Supp. at 19-20.[5]

III. The Decision Below Does Not Present the Third Question Presented in the Petition.

Petitioners' third question concerns a hypothetical suit involving United States law and United States plaintiffs. The district court, however, found it "quite possible" that Chinese law would apply to this case. *Id.* at 21. And petitioners, contrary to their allegations, have among their numbers no United States citizens and very few resident aliens.

Petitioners name nine United States citizens as claimants. Petition at 87. None of these individuals is presently a party to this litigation. The petition itself states that the first four listed, F. Marrs, Y.L. Wang, L. Wang, and N. Wang Lin, were "not

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[5] Petitioners attempt to inflate the importance of any defects in this case by stating that it "involves terrifying defects in hundreds of Boeing's jetliners." Petition at 20. This statement is incorrect. Petitioners' support for it is a Boeing service bulletin included as an appendix to the petition. Petition at 20 n.74. The service bulletin, originally issued ten years *before* the Taiwan accident, deals with the subject of aircraft frame cracks caused by fatigue. *Id.* at 128-29. The Chinese Civil Aeronautics Authority found, however, that the cracks in the aircraft in this case were caused by rust and corrosion. *Cheng*, 708 F.2d at 1408. In fact, EEAT had complied with the Boeing service bulletin. Affidavit of Thurman Jones; Excerpts of Clerk's Record at 713, 720. Furthermore, the accident aircraft showed no signs of frame cracks. *Id.*

parties to the proceedings below." Petition at xx; *see also id.* at 3 n.1 (Mrs. Marrs filed in state court); *id.* at 96 (same). The last five, R. Chow, M. Chow, L. Chow, R. Chow, and K. Chow, were parties in the district court, but failed to file a notice of appeal and therefore were not parties to the Ninth Circuit decision of which petitioners seek review. Excerpts of Clerk's Record at 908-13 (notice of appeal); Petition at 103 (letter of petitioners' attorney); *id.* at 100 (letter of respondents' attorney).

Petitioners also name twelve resident aliens as claimants. Petition at 88-89. Two of these individuals, Y.C. Wang and Y.L. Chow, are not proper parties for reasons stated above.[6] Five more, N.C. Ho, L.W. Lan, L.W. Chin, L. Lai, and P. Chang, have never before in the course of this litigation been identified as United States residents. Petitioners may not now allege their residency. *See Adickes v. Kress & Co.*, 398 U.S. 144, 157 n.16 (1970) (Court cannot consider factual statement not in record of proceedings below); *Russell v. Southard*, 53 U.S. (12 How.) 139, 158-59 (1851) (Supreme Court affirms or reverses upon the case as it appears in the record). The five remaining individuals, M. Rippin, S.J. Sze, E. Sze, S. Sze, and A. Sze are resident aliens and presently parties to this litigation.[7]

Petitioners number, by their own count, more than 500. Petition at 3. They thus ask this Court to rule on a presumption to be accorded a United States plaintiff, when fewer than one percent of them are even resident aliens. Such a ruling, even if favorable to petitioners, would have to be irrelevant to this litigation, given the overwhelming percentage of petitioners who are foreign citizens living abroad. Otherwise, the fortuity of the presence of a few resident aliens in a predominantly foreign lawsuit would have disproportionately significant effects on the forums available to the action. Furthermore, this Court has

[6] Y.C. Wang is not a proper party for the same reason that F. Marrs, Y.L. Wang, L. Wang, and N. Wang Lin are not. J. Chow is not a proper party for the same reason that R. Chow, M. Chow, L. Chow, R. Chow, and K. Chow are not.

[7] Of the four Szes, one is the personal representative of the estate, so that the three are improperly joined under California law. *See* Cal. Civ. Pro. Code § 377 (West Supp. 1983) (heirs or personal representative on their behalf may maintain wrongful death action); *Gordon v. Reynolds*, 10 Cal. Rptr. 73, 75 (Cal. Dist. Ct. App. 1961) (under § 377, administratrix or heirs may sue for wrongful death, but not both).

practically decided the third question by ruling that when a plaintiff who, like almost all of the petitioners, is foreign selects federal court as his forum, his choice deserves less deference than the choice of a resident or citizen plaintiff. *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 255-56 (1981).

None of the circuit court opinions cited by petitioners as conflicting with the decisions of the courts below even suggest the existence of a presumption against dismissing an action brought by a group of foreign plaintiffs because of the presence of a few resident aliens among them.

CONCLUSION

The Petition mischaracterizes the facts and reasoning of the district court and the court of appeals. As a result, the first and third questions the Petition raises are irrelevant to this litigation. The second question this Court has already decided. Consequently, this litigation presents no question of sufficient importance to deserve the attention of this Court, and the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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